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IN THE

# Supreme Court of the United States

October Term, 1975

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1, *Petitioners,*

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND, *Respondents.*

## BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION

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*Petitioners,*

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

*Respondents.*

## BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION

## INTEREST OF AMICUS*

The National Education Association (NEA) is the largest teacher organization in the United States, with a member-

* The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

ship of approximately 1.7 million educators, most of whom are teachers in public educational institutions.

One of NEA's primary purposes is to safeguard the constitutional rights of teachers. To that end, NEA has participated as *amicus curiae* in numerous cases involving the extent to which constitutional due process requires procedural protections for public employees who face discharge. See *e.g., Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sindermann,* 408 U.S. 593 (1972). In this regard, the instant case is of primary importance, since it involves the right to an impartial tribunal, which NEA believes is a *sine qua non* of due process.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The briefs of petitioners and of the amici supporting petitioners' position fail to mention important aspects of the record in this case. When the full record is considered, the asserted bias in this case is not confined solely to that which might be presumed from the combination of the functions of negotiator and adjudicator in the same persons. Rather, the particular facts of this case require an answer to the following question: Where a hearing is required by the due process clause of the Fourteenth Amendment, does a tribunal whose members must sit in judgment upon allegations of their own prior misconduct satisfy the constitutional requirement of impartiality?

In Part I of this brief, we set forth the portions of the record which establish that the propriety of the School Board members' own prior conduct was inextricably a part of the decision which had to be made as to the Hortonville teachers' employment fate.

In Part II of this brief, we argue that the impartial tribunal requirement of due process was not satisfied here. This argument proceeds in the following steps: First, public school teachers who are employed pursuant to one-year con-



tracts, and who have already signed employment contracts for the succeeding year, have property interests in their jobs which may not be taken from them without compliance with the dictates of the due process clause of the Fourteenth Amendment. Second, an impartial tribunal is an essential ingredient, a *sine qua non,* of due process and is required for the "penalty" stage as well as the "guilt" stage of any proceeding to which the protections of due process apply. Third, a tribunal which is required to pass judgment upon allegations of its own members' misconduct does not satisfy the impartial tribunal requirement of due process. Fourth, a state may not render itself exempt from the constitutional obligation to provide due process by claiming it has policy interests more important than that obligation.

## ARGUMENT

### I. THIS CASE POSES THE QUESTION WHETHER A TRIBUNAL WHOSE MEMBERS MUST SIT IN JUDGMENT UPON ALLEGATIONS OF THEIR OWN PRIOR MISCONDUCT SATISFIES THE IMPARTIALITY REQUIREMENT OF DUE PROCESS

The briefs of petitioners, and of the amici supporting petitioners' position, fail to mention important aspects of the record in this case. When those aspects are considered, the issue is not as petitioners seek to present it. Those briefs create the illusion that the question here may be resolved nearly on a level of abstraction: can school board members who have personally participated in collective bargaining negotiations, as adversaries of the teachers' bargaining team, constitute a permissible tribunal, consistent with the impartiality requirement of due process, to determine the measure of discipline to be applied to teachers who unlawfully struck in connection with those negotiations. Difficult as that question might be in the abstract, it is not the question raised by the particular facts of this case.

The asserted bias in this case is not merely that which might be presumed from the combination of the functions of

negotiator and adjudicator in the same persons. At their hearing before the Hortonville School Board (hereinafter referred to as "Board" or "School Board"), the teachers, respondents here, sought to mitigate the discipline that might be imposed upon them—the decisionmaker having discretion to determine the appropriate level of discipline for each teacher—by introducing evidence that, if they engaged in a work stoppage, they were provoked to do so by improper conduct of the School Board members. Under Wisconsin law, such evidence, if persuasive, would have to be weighed in determining the appropriate discipline to be imposed on the teachers (see pp. 16-18, *infra*). Whoever was the decisionmaker thus had to pass judgment upon the propriety of prior actions of the School Board members. Certainly, a constitutionally intolerable risk of bias inheres in allowing the School Board members to make that judgment (see pp. 21-26, *infra*).

We turn to the portions of the record which reveal that such judgment was inextricably a part of the decision which had to be made in this case. In this regard, it is important to note that this case has never gone to trial. The issue now before this Court initially arose for decision upon the motion of the defendants—the Hortonville School District and various of its officers and employees including the individual members of the School Board—for summary judgment. (A. 149-150).[1] Plaintiffs, respondents here, did not file a cross-motion for summary judgment. Therefore, the record here consists only of the pleadings of the parties, and affidavits and exhibits introduced to support or oppose defendants' motion.

In Wisconsin, by statute, public school boards have an obligation to bargain collectively with duly elected teacher representatives. Wis. Stat. §111.70(3)(a)(4) (1973). Here, the School Board members personally conducted the negotiations with the representatives of the Hortonville teachers.

[1] All references to the Appendix in this case shall be cited as "A—."



(A. 95-96). In the hearing to decide the fate of the striking teachers, with the same School Board members presiding, the teachers sought to defend their jobs by introducing evidence that these Board members had acted unfairly, improperly, and, indeed, unlawfully during those negotiations; the teachers even sought to examine the School Board members to establish such misconduct. The pertinent portion of the transcript of that hearing, part of the record herein,[2] reads as follows:

> MR. EHLKE [Counsel for most of the teachers]: My first question is, in effect, because of the Board's involvement as to management of this School District and its involvement in the labor dispute which is the basis for the board's consideration, but hard for a neutral tribunal and some disinterested third party. It seems to me it is no more fair that you should sit in judgment of the employees and the employees should be challenged to have violated your office by conduct in labor matters. What we have to have is a third party and I would like an answer to that.
>
> MR. RUHLE [Counsel for the School Board]: As I advised you on the phone yesterday, the Board is the proper party in the first instance to make decisions of this sort, and it will do so, sir.
>
> * * * * *
>
> MR. EHLKE: Without waiving our total objection to this proceeding, to the lack of timely notice, and opportunity to prepare and to the Board sitting as the judge in this matter, we do have some evidence we would like to put into the record.
>
> * * * * *
>
> MR. RUHLE: Will you give us some kind of inkling as to the nature of the evidence you wish to present?
>
> MR. EHLKE: Yes, it goes to bargaining here, and I have some questions of some of the Board members.

[2] See, A. 38, 62-112, 156.

MR. RUHLE: I will advise the Board as I think I advised you on the telephone yesterday, that the bargaining is immaterial to the allegations in the notices. They are immaterial.

MR. EHLKE: Then I would like to make an Offer of Proof.

MR. RUHLE: All right, you may do so.

MR. EHLKE: Our Offer would be that the proposals for the 1974/1975 as presently on the table; were not significant representation, regressive—in particular the salary schedule structure, and regressive salary schedule; the grievance datelines were regressive; the proposals regarding work-day previously agreed to which the parties and the employer was proposing to have unilateral, which no employee in their right mind could agree to. There was a proposal the Board made to be included in the 1974/1975 collective bargaining agreement that had to do with professional responsibility, but it was a proposal that attempted to govern the interim affairs of the Union, and that's wrong. We would furthermore put into evidence that relative to the calendar for 1973/1974 school year, the Board acted through its agents, Mr. Obry, I believe it was the whole student body, and it is our position that is interference in the bargaining process, it is a coercive device, attempted to bring an outside party to the bargaining table—in this case, the student body. Furthermore, the Board has refused to discuss insurance provisions proposed by the Union; has refused to discuss a fair share. Since this action began, at least in the last two weeks, in response to numerous requests by the Union seeking bargaining and attempting to resolve the parties' differences at the bargaining table, which is where it has to be resolved, the Board has refused these overtures and instead has done what we are at today here.

We further would prove that the Union wasn't notified of the efforts of the overtures to the individual employees which brought them here today. The Union wasn't notified previously when the employees were disciplined by docking of their pay, and this is a denial of the employees' right to be represented; unilateral dealing, which is unlawful.



We further would prove some of the lost teaching time has been occasioned by employees being locked out of their places of employment. In fact, as I understand it, one time chains were put on the door which not only constituted violation of the labor law, but as I understand it, is violation of the safe place statute. There were children in the building when chains were put on the doors, locking them in.

Furthermore, relative to information concerning salary—and that's one of the big items that presently divides the parties—officers of the Union and particularly Mr. Wieniewski and Mr. Counard have been denied information they sought information on, in February. They requested certain information in March, March 31st of this year, and that information was denied to the Union. That information was pertinent to the salary negotiations which are one of the things still on the table.

I think we can prove since this bargaining began, and that was in January, 1973, believe it or not, the makeup of the Board's bargaining committee has changed in considerable respects. People have left and other people have come on; the spokesman has changed; one time Mr. Vergimos, one time Mr. Brakway served as spokesman, Mr. Brown served as spokesman, and all of this has had a tendency to undermine the bargaining process, and made bargaining virtually impossible. If you keep changing personnel and spokesmen, how in the world can you resolve differ-

ences. That's what we will show. That is the information I have been able to learn, that I have been advised of, and I would be prepared, and also prepared to put into the record through witnesses today. There may be more, but I haven't had a chance to investigate the matter that fully, because of time limitations. (A. 91-96).

Counsel for the teachers explained at the hearing the relevance and materiality of this offer of proof to the issues before the School Board:

> MR. EHLKE: If your employees are engaged in work stoppage there is provocation, and if there is provocation, it certainly has something to do with whether or not you're going to discharge them. That's what you are talking about here, when you are talking about breaching a contract and discharging somebody, because of that. There has to be just cause. Maybe you did punch the foreman in the mouth, but if he provoked it and caused it to happen, then that act of punching him in the mouth isn't cause for discharge. If more than your employees are engaged in work stoppage, perhaps some conduct by management people is a prerogative and certainly should be taken into consideration if you are going to discharge somebody. That's why it is material and relevant. (A. 97).

Notwithstanding the Board's repeated statement throughout the proceeding that the hearing concerned not only whether a violation occurred but also the degree of discipline to be imposed (see, e.g., A. 69, 80), the Board determined not to consider the proffered evidence:

> MR. RUHLE: My recommendation to the Board is that it did not consider evidence of the sort enumerated in Mr. Ehlke's Offer of Proof. It is on the one hand immaterial to the alleged conduct; it is on the other hand the right kind of allegation and form of



> adjudication of allegations, and then, of course, the Board doesn't need to defend itself against allegations that are to the extent directed one-sided. So I would recommend that they not permit Mr. Ehlke to proceed to prove what he has just offered to prove.
>
> MR. WEIHING [Chairman of the Board]: Is it [sic] so ordered. (A. 96).

The complaint which initiated this litigation referred specifically to the events detailed above (A. 136), as did both the affidavit submitted by plaintiffs in opposition to defendants' motion for summary judgment (A. 169) and the affidavit of the Chairman of the School Board submitted in support of defendants' motion for summary judgment. The latter stated as follows:

> . . .; that Attorney Ehlke asserted to the Board that the defense which the Hortonville Education Association proposed to demonstrate to the Board, by calling some of the Board members individually and asking questions of them, was that the unlawful collective action engaged in by the teachers since March 18, 1974, had been provoked by the Board of Education; the Board of Education, on the advice of its counsel, refused to hear said evidence, but did permit Attorney Ehlke to make an offer of proof which Attorney Ehlke thereafter did. (A. 156).

The trial court, however, misapprehended the import of this undisputed evidence. That court assumed that the only question before the School Board was whether an illegal strike occurred and *not* also what discipline, if any, to impost on each teacher found to be striking:

> . . . [t]he charge of striking in violation of State Statute was the sole charge before the Board of Education; this is not a situation similar to charges of misconduct or inefficiency where it would be necessary for the decision-maker to judge the credibility of witnesses and

> weigh the evidence. The uncontroverted fact in the situation is that a strike existed and therefore the degree of impartiality which may have been required in other settings was not necessary to adjudicate the single fact involved in this case. In that connection it must be noted further that the plaintiff class has not claimed to have been discharged for any constitutionally impermissible reason. (A. 196-197).

With regard specifically to the teachers' proffer of evidence concerning the Board's misconduct and to the teachers' attempt to examine Board members as witnesses, the trial court ruled that these efforts were not relevant to the hearing since they did not serve to validate the strike:

> Thereafter plaintiffs' counsel made an offer of proof confined solely to the bargaining issues. Clearly, the purpose of adversely examining the board members was not directed to the charge of striking but to facts involving negotiations on a variety of issues in the labor dispute; the purpose was to justify the strike which this Court has deemed legally impossible. The denial of adverse examination of various board members in this context was proper. (A. 197-198).

The Wisconsin Supreme Court expressly rejected the trial Court's assumption as to the limited scope of the hearing. The state supreme court held that the determination of what discipline to impose was as much a part of the hearing as the determination whether a violation occurred. Indeed, the Wisconsin Supreme Court premised its holding[3] that due process had been denied particularly upon the penalty portion of the hearing before the Board: "Therefore, it would seem essential, even in cases of undisputed or stipulated

[3] Though the opinion does not expressly say so, the Wisconsin Supreme Court appears, in effect, to have granted summary judgment for the plaintiffs on the issue of unconstitutional partiality, concluding that on the undisputed facts there was such partiality.



> facts, that an impartial decisionmaker be charged with the responsibility of determining what action shall be taken on the basis of those facts." (A. 252). The School Board here, of course, was found by the court not to possess the requisite impartiality.[4]

The Wisconsin Supreme Court's opinion is less than perfectly clear as to the precise basis for its conclusion that the School Board was not an impartial decisionmaker. At the outset of the opinion, the facts regarding the necessity for the members of the Board to sit in judgment upon their own alleged misconduct are recited:

> Their [the teachers'] counsel also objected on due process grounds, . . . that they were entitled to an impartial decisionmaker to determine the appropriate disciplinary measures, if any. Counsel for the teachers alleged that the work stoppage was provoked by the board's conduct, and sought to examine members of the board to establish that fact. This request was refused, but counsel was permitted to make an offer of proof regarding the unsatisfactory nature of the board's contract offers, its allegedly coercive and unlawful bargaining techniques, and an allegation that teachers were locked out of their places of employment. The board refused to consider the offer of proof and the hearing adjourned at 1:20 p.m. (A. 233).

Later, in the section of the opinion explaining the finding that the Board was not impartial, the following statement is made: "They [the Board members] were, however, not uninvolved in the events which precipitated decisions they were required to make." (A. 253). This statement, by itself, is ambiguous: Did the Wisconsin Supreme Court have reference merely to the general involvement of the

[4] For purposes of this brief, we assume, *arguendo,* that the Wisconsin Supreme Court predicated its decision in this case upon federal constitutional grounds.

Board members in negotiations, or to the fact that the specific nature of this involvement (i.e., their alleged misbehavior) was a factor in the decision that had to be made?

This Court, of course, is not in a position to resolve ambiguities in the Wisconsin Supreme Court decision. On either interpretation, this Court would have to reach a decision based on the complete factual record in the case. Certainly, the plaintiffs-respondents are entitled to have their claim judged by its particular factual components, and that right would survive even if the Wisconsin Supreme Court rendered a decision premised on less than all of the facts in the case.

On the assumption, then, that the issue of unconstitutional partiality will be determined here on the basis of the full factual record before the Court, we turn to the legal arguments.

## II. WHERE A HEARING IS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, A TRIBUNAL WHOSE MEMBERS MUST SIT IN JUDGMENT UPON ALLEGATIONS OF THEIR OWN PRIOR MISCONDUCT DOES NOT SATISFY THE CONSTITUTIONAL REQUIREMENT OF IMPARTIALITY

In the view of this amicus, the argument supporting respondents' position rests on four simple, indeed nearly self-evident, propositions:

1. Public school teachers who are employed pursuant to one-year contracts, and who have already signed employment contracts for the succeeding year, have property interests in their jobs which may not be taken from them without compliance with the dictates of the due process clause of the Fourteenth Amendment.

2. An impartial tribunal is an essential ingredient of due process, and is required for the "penalty" stage as well as the "guilt" stage of any hearing to which the protections of due process apply.



3. A tribunal whose members are required to pass judgment upon allegations of their own prior misconduct does not satisfy the impartial tribunal requirement of due process.

4. A state may not render itself exempt from the federal constitutional obligation to provide due process by claiming it has policy interests more important than that obligation.

We discuss each of these propositions, as they apply here, in turn.

1. The Hortonville teachers had a property interest in their jobs and thereby had constitutional protection against termination without due process.

In *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972), this Court defined the quality of interest in a governmental benefit which amounts to "property" for purposes of determining the applicability of the Fourteenth Amendment's procedural protections:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be aribtrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

The Court in *Roth* went on to make clear that,

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

*Id.* See also, *Perry* v. *Sindermann,* 408 U.S. 593, 602, n.7 (1972).

Here, the Wisconsin courts found that the contractual rights of the Hortonville teachers amounted to property interests which could not be taken away without due process. As the Wisconsin Supreme Court stated,

> In this case the appellant-teachers were discharged during the terms of their 1973-1974 contracts and their offers or contracts for employment for the 1974-1975 school year were revoked or rescinded. This unquestionably amounted to a deprivation of property within the intendment of the due process clause. (A. 247-248).

Petitioners do not contest this much of the Wisconsin Supreme Court's ruling, but they contend that this Court should rule that "[w]here, as here, the teachers have been notified they are considered to be striking, and do not contest the fact even at a record hearing, they should be considered to have abandoned any property for Federal due process purposes." (Brief for Petitioners, hereinafter "Pet. Br." at 20, 21, 32). The obvious flaw in this contention is that it ignores the fact that under the law of Wisconsin the teachers' contracts remained in effect despite the strike.

This Court has previously held, of course, that teachers "dismissed during the terms of their contracts [citation omitted] have interests in continued employment that are safeguarded by due process." *Board of Regents* v. *Roth, supra,* 408 U.S. at 576-577. As noted above, the question whether contract rights exist is one of state law. Thus, petitioners' argument could prevail only if, as a matter of state law, the contractual rights of the teachers are deemed abandoned at the onset of a strike. Here, the Wisconsin courts found state law to provide the contrary. (A. 187, 248). The ruling by the Wisconsin courts that the contractual relationship survived the initiation of the strike is a binding interpretation of state law. As a matter of federal



law, applying the *Roth* definition, these state law-created contractual rights constitute property interests which cannot lawfully be terminated by the School Board without due process.

It is important to add here that, while state law establishing a contractual right is conclusive that a property interest exists as a matter of federal law, it by no means follows that such a property interest could automatically be defeated by state law providing for the termination of a contractual right. By definition, once a property interest exists, the protections of due process apply to any effort by the state to take that interest away. A state may not create a property interest which is immune from those protections.[5] Thus, it may not create such an interest and then avoid the requirements of the Constitution by providing that the interest may be automatically defeated upon the occurrence of a condition subsequent that is not subject to the hearing requirement. If a state, for example, provides that a public employee could be dismissed only for sufficient cause the state could not avoid its obligation to afford an employee facing dismissal a due process hearing on the theory that by engaging in conduct amounting to sufficient cause the employee had "abandoned" his property interest. Such a result would permit the state to circumvent its constitutional obligation by unilaterally determining—without providing the employee a hearing—that cause for discharge existed. Therefore, had Wisconsin law been that contractual rights are abandoned in the event of a strike—even contractual rights for the next school year—the teachers would still have been entitled by the Constitution to the protections

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[5] In *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), a case involving property interests created by federal statute, six members of this Court expressly adopted this view. 416 U.S. at 166-167 (opinion of Justice Powell, joined by Justice Blackmun); 416 U.S. at 177-186 (opinion of Justice White); 416 U.S. at 209-211 (opinion of Justice Marshall, joined by Justices Douglas and Brennan).

of due process before the property interests established initially by those contractual rights could be taken away.[6]

2. An impartial tribunal is an essential ingredient of due process, and is required for the "penalty" stage as well as the "guilt" stage of the disciplinary hearings to which the Hortonville teachers are entitled.

An impartial decisionmaker is a *sine qua non* of procedural due process. All other procedural guarantees are without substance if the deciding tribunal is not so constituted as to be able to render a fair and unbiased decision. A risk of undue partiality jeopardizes the entire structure of procedural safeguards. *In re Murchison,* 349 U.S. 133, 136 (1955); *Gibson* v. *Berryhill,* 411 U.S. 564, 579 (1973); *Withrow* v. *Larkin,* 421 U.S. 35 (1975). Thus, the Constitution does not permit a citizen to be deprived of liberty or property as the result of a determination by a tribunal which is unduly biased. Yet here, petitioners apparently argue that the Constitution tolerates a biased tribunal for the decision as to the measure of discipline the Hortonville teachers should receive: should they lose their jobs or suffer some lesser penalty. We address this contention at this point and show that the impartial tribunal requirement of due process applies to the "penalty" stage of the hearing. In the next section of the brief, we show that the School Board did not meet the constitutional standard of impartiality.

At the outset, it is clear, and petitioners do not dispute, that as a matter of Wisconsin law, the disciplinary decision encompasses two distinct questions: (1) Did each accused teacher engage in an improper work stoppage? (2) In the case of each teacher found to have been so engaged, what measure of discipline should be imposed? The Board,

[6] The Wisconsin courts also found that the teachers here had a liberty interest which required the protections of due process. Since there is so clearly a property interest, the Court need not pass upon this point and therefore we do not address it.



through its counsel, announced at the hearing that both issues were to be determined, conceding that the penalty of discharge does not automatically flow from a finding of involvement in an improper strike. (A. 69, 80).[7] The Wisconsin Supreme Court expressly confirmed this view in its opinion. (A. 239-240, 251-252). Indeed, that court cited one of its prior decisions which had ruled that evidence of the public *employer's* conduct—there with respect to employees other than the one subject to discipline—was relevant in such a proceeding to the determination as to the appropriate penalty to be imposed. *Durkin* v. *Board of Police & Fire Commissioners for Madison,* 48 Wis. 2d 112, 180 N.W. 2d 1, 6 (Wis. Sup. Ct. 1970).

Petitioners' argument is that since the penalty phase of the proceeding did not involve any factual dispute,[8] an impartial tribunal was not required for that phase. (Pet. Br. at 26-27). This argument is wrong both as to the facts of this case and as to the law.

First, petitioners are simply incorrect when they assert that the decision as to penalty did not involve questions of fact. The accused teachers, after all, sought to mitigate the discipline they would receive by showing that they had acted under the provocation of the Board members' misconduct. The decisionmaker was asked, in effect, to find that there had been wrong done on both sides and that under the circumstances a just resolution for each teacher would require discipline less severe than discharge. A factual evaluation of the charges made against the Board members was thus necessitated. The Board cannot evade this this responsibility simply by a self-serving declaration that

[7] In fact, in the case of at least one teacher found by the Board to have been engaged in the alleged strike here, the Board imposed a less severe penalty than discharge. (A. 117).

[8] For purposes of this analysis, we shall assume, *arguendo,* that there was no factual dispute as to whether each of the accused teachers had engaged in an improper strike.

such an inquiry is not material, for Wisconsin law indicates the contrary. See, *Durkin* v. *Board of Police & Fire Commissioners for Madison, supra,* 180 N.W. 2d at 6.[9]

This factual inquiry, no less than the inquiry underlying the guilt determination, requires an unbiased tribunal. At a minimum, the impartiality requirement of due process prevents the deprivation of property on the basis of factual determinations made by a tribunal unable "to hold the balance nice, clear, and true. . . ." *Tumey* v. *Ohio,* 273 U.S. 510, 532 (1927). The property interests of the teachers given protection by the due process clause are no less at risk in the factual inquiry concerning penalty than in that concerning guilt.

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[9] Even if Wisconsin law did not so provide, constitutional due process may also require that, in a situation where, as here, the law makes the degree of penalty turn on the existence of mitigating circumstances, evidence offered in mitigation be admitted before a citizen may be deprived of liberty or property. See, *Cooke* v. *United States,* 267 U.S. 517, 538 (1925):

> The court proceeded on the theory that the admission that the petitioner had written the letter foreclosed evidence or argument. In cases like this *where the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed, the court cannot exclude evidence in mitigation.* (Emphasis added).

In *Morrissey* v. *Brewer,* 408 U.S. 471, 488 (1973), the Court stated that a parolee has a right to introduce evidence in mitigation at a parole revocation hearing:

> The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.

See also, *Gagnon* v. *Scarpelli,* 411 U.S. 778, 790 (1973), where this Court, after ruling that an impartial tribunal is required for both the "guilt" and "penalty" stages of a parole revocation hearing, presumed that a right to counsel at the "penalty" stage would exist when:

> even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.



Perhaps more fundamental, and regardless of the existence of a factual dispute, the argument made here by petitioners would leave the concept of due process twisted beyond recognition. Surely it proves too much to say that the determination to deprive a citizen of property, or presumably liberty, may be made by a biased tribunal whenever that determination does not turn on a dispute of fact. Would petitioners permit a biased judge to impose sentence on a confessed criminal? Would petitioners persevere in their argument here if it were shown that the School Board members had each accepted a bribe in exchange for a promise to discharge the striking teachers?

This notion that due process does not require an impartial decision-maker for the penalty stage of a proceeding involving the deprivation of liberty or property has previously been rejected by this Court. In *Tumey* v. *Ohio, supra,* 273 U.S. at 533, 535, the Court was careful to indicate that the requirement of an impartial tribunal applies as well to the determination of punishment in a criminal case as to the finding of guilt:

> The mayor represents the village and can not escape his representative capacity. On the other hand, he is given the judicial duty first of determining whether the defendant is guilty at all, and *second having found his guilt to measure his punishment between $100 as a minimum and $1,000 as a maximum for first offenses, and $300 as a minimum and $2,000 as a maximum for second offenses.* With his interest as mayor in the financial condition of the village and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial *or a fair sentence* from one who would have so strong a motive to help his village by conviction and a heavy fine?
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> * * * * *

It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined

> $100 which was the minimum amount, and therefore that he can not complain of a lack of due process, either in his conviction or in the amount of the judgment. The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge. He seasonably raised the objection and was entitled to halt the trial because of the disqualification of the judge which existed *both because of his direct pecuniary interest in the outcome and because of his official motive to convict and to graduate the fine to help the financial needs of the village. There were thus presented at the outset both features of the disqualification.* (Emphasis added).

See also, *Ward* v. *Village of Monroeville,* 409 U.S. 57, 62 n.2 (1972).

Similarly, in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) and *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973), the Court made clear that an independent decisionmaker is required for both the "guilt" and "penalty" stages of parole revocation hearings.[10]

Even petitioners seem to admit that their argument on this point reaches too far. At pages 25 and 29 of their brief, they apparently concede that the proceeding under examination here would have been "constitutionally defective" had there been a "showing of actual pecuniary interest or personal bias." But if they mean this concession, they would have to agree that the due process requirement of an impartial tribunal applies to both segments of a teacher disciplinary hearing. Ultimately, then, their position seems to rest on the assumption that the Board here qualified as the kind of impartial tribunal required by the due process clause. We discuss that assumption next.

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[10] Cf. *Offutt* v. *United States,* 348 U.S. 11, 15 (1954); *Giacco* v. *Pennsylvania,* 382 U.S. 399 (1966); *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968).



3. The School Board could not constitute an impartial tribunal, as required by due process, to review and evaluate allegations of its members' misconduct.

The relationship between a public employer and its employees is unique in many respects, and that very uniqueness poses unusual problems in applying seemingly well-established principles of constitutional law. See, *e.g., Pickering* v. *Board of Education,* 391 U.S. 563, 568-571 (1968). It is not surprising, therefore, that difficulties are encountered in applying the "impartial tribunal" requirement to an employer sitting in judgment upon employees with property interests in continued employment who have been charged with misconduct. On the one hand, there are certain "employer" concerns inherent in the situation: if the employer is the decisionmaker, it may have parochial interests—independent of abstract justice to the employees—which may influence its resolution of the matter.[11] On the other hand, there is a natural reluctance to declare public employers automatically disqualified in all cases from deciding matters which may be central to the efficient accomplishment of public objectives entrusted to them. This clash of values has begun to receive some attention from the lower courts, with no clear resolution yet emerging.[12]

Petitioners, and the *amici* supporting them, attempt to portray this case as one calling for a definitive resolution of this question. They suggest that the issue here is simply whether a public employer is disqualified by its role as "em-

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[11] For example, the employer may want to show other employees that it "means business" in setting down rules of conduct; it may feel impelled to uphold a supervisor's recommendation of discipline simply to preserve the supervisor's authority even though doubting the wisdom or fairness of the recommendation; or, as the teachers have alleged here, it may have a more nefarious motivation, such as breaking a union or diffusing the strength of an employee effort to secure better terms and conditions of employment.

[12] See *Fuentes* v. *Roher,* 519 F.2d 379, 389-390 (2d Cir. 1975); *Lucas* v. *Wisconsin Electric Power Company,* 466 F.2d 638, 652, n. 30 (7th Cir. 1972).

ployer" from sitting in judgment of misbehaving employees. But that is *not* the issue here. The issue here is not whether the members of the school board *qua* employer representatives were disqualified by their "employer" interests, but rather whether those members *qua* human beings were disqualified by the necessity to pass judgment upon the propriety, indeed legality, of their own prior conduct.

The broader "employer" question need not be reached here, for even if the law were ultimately to develop that in ordinary circumstances employers may sit in judgment of their employees, it is our contention that no person, in any context, may sit fairly in judgment of his own conduct.

Whether a constitutionally intolerable risk of bias is present here may be decided by reference to principles already well-established by this Court. Petitioners argue, relying upon this Court's recent decision in *Withrow* v. *Larkin,* 421 U.S. 35 (1975), that "the bare presence of two functions does not disqualify a decisionmaker" (Pet. Br. 27-29). Whatever force that assertion might have had in *Withrow,* it is misplaced here, since, as shown above at pages 3-12, there is in this case, in addition to a combination of functions, a more particular and more powerful biasing factor: the necessity for the members of the School Board to sit in judgment upon allegations of their own misconduct. When the peculiar facts of this case are considered, it is respondents, not petitioners, who may find comfort in the *Withrow* decision.

*Withrow* marked no departure from this Court's prior commitment to the requirement of an impartial tribunal:

> Concededly, a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson* v. *Berryhill,* 411 U.S. 564, 579 (1973). Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent



> even the probability of unfairness." *In re Murchison, supra,* at 136; *cf. Tumey* v. *Ohio,* 273 U.S. 510, 532 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.

421 U.S. *supra* at 46-47 (footnotes omitted).

The Court in *Withrow* enunciated a standard by which to determine whether a given situation presents a constitutionally intolerable risk of bias: "under a realistic appraisal of psychological tendencies and human weakness," do the circumstances pose "such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* at 47.

The Court found no such risk posed on the facts of *Withrow.* There, unlike here, the risk of bias was solely attributable to a bare combination of functions. The issue was whether administrative officials were automatically disqualified as decisionmakers because they had conducted an initial investigation and issued a "probable cause" determination triggering the proceeding over which they would preside. The Court noted that there, unlike here,

> No specific foundation has been presented for suspecting that the Board had been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing. The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing.

*Id* at 55.

Applying the standard it had announced to the facts of the case, the *Withrow* Court concluded:

> The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position. Indeed, just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute. Here, if the Board now proceeded after an adversary hearing to determine the appellee's license to practice should not be temporarily suspended, it would not implicitly be admitting error in its prior finding of probable cause. Its position most probably would merely reflect the benefit of a more complete view of the evidence afforded by an adversary hearing.

*Id.* at 57-58.

Significantly, the Court qualified this holding as follows:

> That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high. Findings of that kind made by judges with special insights into local realities are entitled to respect, but injunctions resting on such factors should be accompanied by at least the minimum findings required by Rules 52 (a) and 65 (d).

*Id.* at 58.

Even more important, the Court was careful to distinguish



a line of prior decisions which in our view are controlling here:

> . . . [T]he District Court rested its decision upon *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973), and *Morissey* v. *Brewer,* 408 U.S. 471 (1972). These decisions, however, pose a very different question. Each held that when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review. *Gagnon, supra,* at 785-786; *Morrissey, supra,* at 485-486; see also *Goldberg* v. *Kelly,* 397 U.S. 254, 271 (1970). Allowing a decisionmaker to review and evaluate his own prior decisions raises problems that are not present here. Under the controlling statutes, the Board is at no point called upon to review its own prior decisions.

*Id.* at 58, n. 25.

If an intolerable risk of bias is presented where a decisionmaker is called upon "to review and evaluate his own prior decisions," it follows, *a fortiori,* that an intolerable risk exists where, as here, a decisionmaker is called upon to review and evaluate allegations of his own prior misconduct. The risk was intolerable that the parole officers in *Morrissey* and *Gagnon,* or the social workers in *Goldberg* v. *Kelly,* were "so psychologically wedded" to their initial determinations as to "foreclose [ ] fair and effective consideration at a subsequent adversary hearing." 421 U.S., *infra,* at 58. Compare the risk here, where a fair determination of the discipline to be imposed upon each teacher depends on the ability of each Board member impartially to consider and evaluate the charge that he, the Board member, has acted improperly. If the evidence bore out the teachers' charges, a truly impartial tribunal might well decide that the negotiating conduct of the Board was such as to justify a less severe discipline than discharge. But it defies common sense and experience to expect that the Board members themselves could reach this result. "[A] realistic appraisal of psychological

tendencies and human weakness" must convince that to permit the Board members to make this judgment poses an intolerable "risk of actual bias or prejudgment."

This case comes down to a first principle: "[N]o man shall be judge in his own cause." *Bonham's Case,* 8 Co. 114a, 118a, 77 Eng. Rep. 646, 652 (1610); *In re Murchison,* 349 U.S. 133, 136 (1955);[13] see also, *Arnett* v. *Kennedy,* 416 U.S. 134, 170, n.5, 196-199 (1974) (separate opinions of Justices Powell and White); *Fuentes* v. *Roher,* 519 F.2d 379, 389-390 (2d Cir. 1975). As this Court recently put it, an adjudicator may become "so embroil[ed] . . . in [the] controversy that he cannot 'hold the balance nice, clear and true between the State and the accused. . . .'" *Taylor* v. *Hayes,* 418 U.S. 488, 501 (1974); *Johnson* v. *Mississippi,* 403 U.S. 212, 215-216 (1971); *Mayberry* v. *Pennsylvania,* 400 U.S. 455 (1971).

The School Board members simply did not constitute an impartial tribunal within the requirement of due process.

4. A state may not render itself exempt from the federal constitutional obligation to provide due process by claiming it has policy interests more important than that obligation.

Petitioners devote substantial attention in their brief to arguments which amount to a claim that Wisconsin school boards should be considered exempt from the impartial tribunal requirement of constitutional due process. We are told, in effect, that the State of Wisconsin has chosen to structure its public school system in a manner which in circumstances such as present here is inconsistent with that constitutional requirement, and that, therefore, when such cir-

[13] The Court in *Murchison,* 349 U.S. at 138-139, made the following observation, which has pertinence here: "If the charge should be heard before that judge, the result would be either that the defendant must be deprived of examining or cross-examinating him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant."



cumstances arise, the Constitution must give way. As we shall show, these arguments not only are misguided as a matter of law but also rest upon disingenuous factual premises.

Petitioners' arguments in this regard may be summarized as follows: In Wisconsin, each public school board is comprised of members chosen by an election within the school district it governs. To each board so constituted, state law commits the sole power to hire and fire teachers and, more generally, to run the schools within its district. The decision of the Wisconsin Supreme Court requires that in cases such as this, a body other than a school board may ultimately determine whether a teacher should be discharged. Therefore, the argument runs, the school district's electorate is deprived of its right to have that determination made by its elected representatives. Indeed, petitioners argue, the electorate is deprived of its right to have those representatives make the basic policy determinations as to how the schools should be run. This result, they say, is unacceptable.

The short answer to these contentions is that petitioners have apparently forgotten the supremacy clause of the Constitution. Federal constitutional rights do not give way to inconsistent state policies. The states are free to structure their institutions as they wish, but always within the limits set by the Constitution. Petitioners' argument here is completely circular: Wisconsin has established a procedure which violates due process, and, therefore, the requirements of due process should give way to the state policy underlying that procedure.

This Court rejected a similar argument in *Tumey* v. *Ohio, supra,* 273 U.S. at 534-535, when it held that the institution established by the state to make certain judgments on behalf of the community was constitutionally disqualified from doing so:

> Counsel for the state argue that it has been decided by this Court that the legislature of a state may provide such system of courts as it chooses, that there is nothing

in the 14th Amendment that requires a jury trial for any offender, that it may give such territorial jurisdiction to its courts as it sees fit, and therefore that there is nothing sinister or constitutionally invalid in giving to a village mayor the jurisdiction of a justice of the peace to try misdemeanors committed anywhere in the county, even though the mayor presides over a village of 1,100 people and exercises jurisdiction over offenses committed in a county of 500,000. This is true and is established by the decisions of this court in Missouri v. Lewis (Bowman v. Lewis) 101 U.S. 22, 30, 25 L.ed. 989, 992; Re Claasen, 140 U.S. 200, 35 L.ed. 409, 11 Sup. Ct. Rep. 735. See also Carey v. State, 70 Ohio St. 121, 70 N.E. 955. It is also correctly pointed out that it is completely within the power of the legislature to dispose of the fines collected in criminal cases as it will, and it may therefore divide the fines as it does here, one-half to the state and one-half to the village by whose mayor they are imposed and collected. It is further said with truth that the legislature of a state may and often ought to stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the state and the people. The legislature may offer rewards or a percentage of the recovery to informers. United States v. Murphy, 16 Pet. 203, 10 L.ed. 938.

It may authorize the employment of detectives. *But these principles do not at all affect the question whether the state by the operation of the statutes we have considered has not vested the judicial power in one who by reason of his interest, both as an individual and as chief executive of the village, is disqualified to exercise it in the trial of the defendant.* (Emphasis added.)

Even on their own terms, however, petitioners' arguments do not bear analysis. In the first place, they prove too much. As discussed above, petitioners seem to concede in their brief



that if "a showing of actual pecuniary interest or personal bias" were made, the proceeding before the School Board would be "constitutionally defective" (Pet. Br. 29). But in those circumstances, as here, disqualification of the Board would require that another tribunal make the decision. Thus, with this concession, petitioners' arguments reduce again simply to whether the risk of bias here is tolerable. As discussed in the preceding portion of this brief, by the standards established by this Court, the risk of bias here is constitutionally intolerable.

Second, analysis of Wisconsin law reveals that the power of public school boards to discharge teachers is by no means sacrosanct even as a matter of state law. As petitioners note in their brief (Pet. Br. 29-31), and as discussed in the opinion of the Wisconsin Supreme Court (A. 255), state law already provides two methods by which a school board's decision to discharge a teacher may be reviewed: (1) by common-law writ of certiorari to, incidentally, the very court in which the Wisconsin Supreme Court has now vested the power of *de novo* review when a school board is constitutionally disqualified from sitting; (2) by a complaint filed with the Wisconsin Municipal Employment Relations Commission. The Wisconsin Supreme Court found that neither of these two modes of review is adequate in scope to rectify the problem in this case. (A. 255). Nevertheless, their existence reflects that the policy of the State of Wisconsin contemplates bodies other than school boards ruling on the validity of teacher discharges; the state courts and a state commission may overrule a school board decision to discharge a teacher and may indeed require that the teacher be reinstated. (Pet. Br. at 30). It was, perhaps, this structure of review to which the Board's attorney referred in the course of the hearing in this case. when he said: ". . . [T]he Board is the proper party *in the first instance* to make decisions of this sort, . . . ." (A. 92).

Petitioners' final argument from state policy can only be

characterized as disingenuous. They insist that to disqualify a school board in a case such as this would deprive it of the power to deal effectively with an illegal teacher strike and indeed of the ability to keep the schools open in case of such a strike. (Pet. Br. 15-18). Every effort is made by petitioners to transform this case from one concerning a teacher termination hearing to one concerning "the decision 'what to do' about schools closed by an illegal strike." (Pet. Br. 29, n.8).

The fact is, however, that the Board's ability to keep the schools open is not dependent on the resolution of this case. As petitioners admit, the Board could have obtained injunctive relief against the illegal strike. (Pet. Br. 16). Petitioners feebly offer only that "[p]ublic employees have continued to strike, or begun another strike despite an injunction." (Pet. Br. 16, n.1). Surely the state judiciary is not impotent to enforce its own decrees.

It is pertinent here that Wisconsin courts have not considered teacher strikes necessarily to create the significant risk of public harm which petitioners assert. In Wisconsin, teacher strikes are not considered, *per se,* to create an "immediate and serious harm to public health and safety," and, accordingly, Wisconsin courts do not automatically act to enjoin such strikes. In *Joint School District No. 1, City of Wisconsin Rapids* v. *Wisconsin Rapids Education Association,* ——Wis. 2d. ——, —— N.W. 2d ——, 90 LRRM 3225, 3232 (1975) (Wis. Sup. Ct. Case No. 116, August Term, 1975), the Wisconsin Supreme Court stated the law and the policy of the state as follows:

> Public employment strikes are a reality which cannot be ignored. While the potential for immediate and serious harm to public health and safety is very real in the case of strikes by policemen, firemen, and, to a lesser extent, sanitation workers, it is not critical where, for example, the strike is one by teachers, clerical employees or construction workers and others. We conclude in this case that immediate and serious harm to public health and safety was not apparent and that an injunction should issue only after a showing of irreparable harm dependent upon the facts and circumstances as shown at the hearing.



Thus, as justification for blinking the requirements of due process, petitioners ask this Court to exalt the importance of the harm caused by Wisconsin teacher strikes beyond that accorded by the Wisconsin Supreme Court. In any event, where the Wisconsin courts find it appropriate to put an end to a strike, they have the power to do so. The issue in this case is not the ability of the state to keep its schools open, but whether teachers were deprived of their jobs, in which they had a property interest, without protections required by due process.

In this connection, petitioners also suggest that the relief provided in the instant case by the Wisconsin Supreme Court would effectively preclude the School Board from making meaningful policy determinations as to how to deal with the strikers. But the decision of that court contemplates not only an initial decision by the School Board, but also full opportunity for the Board to participate as an adversary in the *de novo* court hearing. (A. 257). Presumably, the Board would be fully able to present all of its policy determinations—including all those which have been presented to this Court—to the reviewing court, and that court would have to accord due weight to such determinations.

It is important to remember that while the decision that the Board must be disqualified is one based on federal law, the decision as to what substitute procedure to adopt is one of state law—as long as the procedure adopted conforms to the mandates of the federal constitution. The particular choice of remedy adopted by the Wisconsin Supreme Court is not the issue here. The words of this Court in *Morrissey* v. *Brewer, supra,* 408 U.S. at 488-489, have application here:

> We cannot write a code of procedure; that is the re-

> sponsibility of each State. Most states have done so by legislation, others by judicial decision usually on due process grounds. Our task is limited to deciding the minimum requirements of due process. (Footnote omitted.)

See also, *Niemotko* v. *Maryland,* 340 U.S. 268, 285 (1951) (Justice Frankfurter concurring in the result).

If the procedure adopted by the Wisconsin Supreme Court does not fully realize the legitimate state values which are implicated, relief must be sought from the Wisconsin legislature or courts. Certainly, numerous other states have managed to adopt procedures for handling teacher discharge hearings which would have avoided the constitutional defect present here.[14]

For now, however, this Court should affirm the finding of the Wisconsin Supreme Court that the School Board in this case did not constitute an impartial tribunal as required by the due process clause of the Fourteenth Amendment.

[14] See, *e.g.*, Cal. Educ. Code Ann. (Deerings) §§13412-13439; Colo. Rev. Stat. §§22-63-117; Nev. Rev. Stat. §§391.311-391.3194; N.J. Stat. Ann. title 18A, §§6-9, 27, 30.1 and 28-5; N.Y. Educ. Law §3020-a (McKinney); Ore. Rev. Stat. §§342.805 to 342.955; Wash. Rev. Code §§28A.58.450—28A.58.515.



## CONCLUSION

For the foregoing reasons, the decision of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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